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In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1972

No. 72-1494

UNITED STATES OF AMERICA, *Petitioner,*

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA
DRAKE'S BEACH ESTATES, INC., *Respondent*

BRIEF OF DRAKE'S BEACH ESTATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Subject Index

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Statement of case 4

1. On the issue of title 4

2. and 3. On the admission of subdivision and probabilities evidence 6

Argument 11

I

Questions on the title issue as presented in the petition 11

Question No. 1 on page 2 of the petition 11

Question No. 2 on page 2 of the petition 12

II

On the evidentiary issues 13

A.

Subdivision facts and appraisal method evidence are admissible (on question No. 3 on page 2 of the petition) 14

1. Lot sales separately admissible 15

2. Development costs separately admissible 15

3. Testimony as to the "developer's" or "subdivision appraisal method" is admissible 16

4. Rules favor admissibility 16

5. Subject property presented a rare condemnation appraisal problem 17

6. In absence of comparable sales, other methods and data are admissible 18

7. Evidence admissible which would influence an informed buyer and seller of a developing subdivision 18

8. Government contentions disproven by the record 20

(a) Appraisal method 20

(b) Not speculative 20

Page

(c) Related to market 21

(d) Market value—not highest price 21

(e) Increased litigation 22

9. This case turns on its own facts 22

10. Desired result: indemnity for what was taken.. 23

11. Summary 24

B.

Opinion evidence as to reasonable probabilities (of availability of an agreement with the state adjoining tidelands) is admissible 24

1. No procedural question was presented to the Court of Appeals (on Question No. 4 page 3 of the petition) 24

2. For the jury to consider (admissible) 25

3. Preliminary matters were decided by the judge 27

4. Jury weighed opinions 31

5. No procedural error; but if there was any the government invited it 32

6. This evidence was insignificant and not necessary to support the judgment 34

7. Summary 35

Conclusion 37

Table of Authorities Cited

Cases	Pages
Almota Farmers Elevator and Warehouse Co. v. United States, ... U.S. ..... (No. 71-951)	21, 26
Anderson v. Trotter, 213 C. 414 (1931), cert. den. 284 U.S. 686	5
Brown v. American Railway Express Corp., 128 S.C. 428, 123 S.E. 97	27
Buena Park School Dist. v. Metrim Corp., 176 Cal.App. 2d 255 (1959)	16
Crockett v. United States, 136 F.2d 11 (9th Cir. 1943)	33
Dash v. State, 491 P.2d 1069 (1971)	16
Devine v. Zimmerman, 133 F.2d 850 (8th Cir. 1943)	33
Drake's Bay Land v. United States, 424 F.2d 574 (Ct.Cl. 1970)	16
Drake's Bay Land v. United States, 459 F.2d 504 (1972)	16, 19
Fairfield Gardens, Inc. v. United States, 306 F.2d 167 (9th Cir. 1962)	18
Foster v. Herley, 330 F.2d 87 (6th Cir. 1964)	19
Hanson Lumber Co. v. United States, 261 U.S. 581 (1923)	18
Hardin v. Jordon, 140 U.S. 371 (1891)	5
Hazard Lewis Farms v. State of New York, 1 A.D.2d 923 (1956), 149 N.Y.S.2d 658	16
Highland Park v. United States, 142 Ct.Cl. 269 (1958)	16
Hogston v. Bell, 185 Ind. 536, 112 N.E. 883	27
Hopkins v. Blank, 506 P.2d 57	16
In re Elmwood Project (City of Detroit v. Cassese), 376 Mich. 311	19
In re Rahn's Estate, 316 Mo. 492, 291 S.W. 120	27
Kimball Laundry v. United States, 338 U.S. 1 (1949)	18, 26
Law v. United States, 266 U.S. 494 (1925)	33
McCandless v. United States, 298 U.S. 342 (1936)	15, 25, 26, 30, 31
Napa Union High School Dist. v. Lewis, 158 Cal.App.2d 69 (1958)	17

Pages

New York Life Insurance Company v. Hamburger, 124 Mich. 254, 140 N.W. 510 27
Niles v. Cedar Point Club, 175 U.S. 300 (1899) 11

Olson v. United States, 292 U.S. 246 (1934) 3, 25, 26, 30, 31

Pacific Indem. Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939) 33
People v. Auburn Ski Club, 241 Cal.App.2d 781 (1966) ... 15
People v. Ogata, 240 Cal.App.2d 262, 49 Cal.Rptr. 397 (1966) 26
Platt v. United States, 163 F.2d 165 (10th Cir. 1947) 33

Santa Clara County Flood Control & Water Conservation Dist. v. Fratis, 177 Cal.App.2d 264 (1960) 16
Sayre v. United States, 282 F.Supp. 175 (1967) 19
Seaboard Airlines R. Co. v. United States, 261 U.S. 299 (1923) 23
St. Joe Paper Co. v. United States, 155 F.2d 93, 97 (5th Cir. 1946) 18
State v. Cobb, 169 So.2d 419 16
State Highway Dept. v. Thomas, 128 S.E.2d 520 16

Thomas R. Bishop Co. v. Santa Barbara County, 96 F.2d 198 (9th Cir. 1938), cert. den., 305 U.S. 623 5
Todd v. United States, 155 Ct.Cl. 111 (1961) 19

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943) 25
United States v. An Easement and Right of Way, 248 F. Supp. 702 (1965) 15
United States v. Benning, 276 F.2d 248 (5th Cir. 1960) 19
United States v. Certain Land in Brooklyn, 346 F.2d 690 (2d Cir. 1965) 15
United States v. Delano Park, 146 F.2d 473 (C.A.2d 1944) . 29
United States v. Easement and Right of Way Over Two Strips, 284 F.Supp. 71 (1968) 16
United States v. Ham, 187 F.2d 265 (8th Cir. 1965) 26
United States v. Hickey, 360 F.2d 127 (7th Cir. 1966) 16
United States v. Iriarte, 166 F.2d 800 (1st Cir. 1948) (cert. den. 335 U.S. 816 (1948) 16
United States v. Land in Drybed of Rosamond Lake, 143 F.Supp. 314 (1956) 26

Pages

United States v. Lowrie, 246 F.2d 472 (4th Cir. 1957) 15
United States v. Meadowbrook Club, 259 F.2d 41 (C.A.2d 1958) 19, 29
United States v. Miller, 317 U.S. 369 (1943) 17, 18, 19, 23
United States v. Reynolds, 397 U.S. 14 (1970) 3, 30, 31, 35
United States v. Sowards, 339 F.2d 401 (10th Cir. 1964) .. 18
United States v. Waterhouse, 132 F.2d 699 (9th Cir. 1943), aff'd 321 U.S. 743 (1944) 16, 25, 26, 31
United States v. 2.4 Acres, 138 F.2d 295 (7th Cir. 1943)...18, 19
United States v. 4.105 Acres, 68 F.Supp. 279 (1946) 26
United States v. 55.22 Acres of Land, etc., Yakima Co., Wash., 411 F.2d 432 (9th Cir. 1969) 14, 15
United States v. 84.4 Acres, 348 F.2d 117 (3rd Cir. 1965).. 15
United States v. 3276.21 Acres, 194 F.Supp. 297 26
United States v. 12 Tracts, 268 F.Supp. 125 (1967) 15

Wibye v. United States, 87 F.Supp. 830, aff'd 191 F.2d 181 (9th Cir. 1951) 17, 26
Wolff v. Commissioner of Puerto Rico, 341 F.2d 945 (1st Cir. 1965) 26

Codes

Public Resources Code:
Section 6307 28
Section 6357 28

Rules

Federal Rules of Civil Procedure:
Rule 43 26
Rule 43(a) 17, 26

Statutes

28 U.S.C. 1254(1) 2

Texts

Paul Fullerton, "Development Analysis for the Valuation of Vacant Land," Journal of the American Institute of Real Estate Appraisers, Vol. XXXIII (April, 1965), pp. 211-225 20

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OPINIONS BELOW

The opinion of the Court of Appeals and the Findings of Fact and Conclusions of Law of the District Court are printed in Appendix "A" and Appendix "D", respectively, of the Petition. The opinion is reported at 468 F.2d 1261.

JURISDICTION

The judgment of the Court of appeals was entered on September 25, 1972, and a petition for writ of certiorari was filed on May 4, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). Respondent does not raise the question of jurisdiction.

QUESTIONS PRESENTED

1. On the Issue of Title:

The only question presented to and determined by the Court of Appeals was whether or not the findings of the District Court (to the effect that the land sought to be condemned was a continuation of the mainland lying above ordinary high tide and not an island at the time of the issuance of the patent through which Respondent deraigned title) were supported by substantial evidence.

(See Opinion of Court of Appeals, pages 4a and 5a of Appendix "A" to the Petition.)

2. On the Issue of Admissibility of Subdivision Evidence:

The question presented to and determined by the Court of Appeals was whether the trial court abused its discretion in admitting evidence as to lot sales, development costs and the "developer's residual appraisal method" for jury consideration in determining the fair market value of the condemned property, a unique property which was an integral part of an already developed subdivision the development of which was imminent and as to which there were no comparable sales.

3. **On the Issue of Admissibility of Probabilities Evidence:**

There was no procedural question presented to or determined by the Court of Appeals concerning the function of the trial judge and jury per *United States v. Reynolds,* 397 U.S. 14 (1970). The only issues presented to and determined by the Court of Appeals dealt with the *competency* of an expert witness and, as to the *sufficiency of a foundation* (under *Olson v. United States,* 292 U.S. 246 (1934) for the *admissibility* of his opinion testimony, dealing with reasonable probabilities evidence (exchange of land procedures, dredging on state tidelands, etc.), which evidence was admitted for jury consideration in determining market value.

Nor does the trial record present this question. Rather 1) the trial court did find a sufficient foundation existed for admissibility of this evidence, 2) the jury properly considered evidence and reasons given in support of expert opinion as to reasonable probabilities (of an agreement re tidelands—the jury did not determine "tidelands policy"—there was no such "policy"). There were two statutes (each authorizing an agreement) and reasons were given to the Court for application of said agreements; the government's characterization of one of these considerations as a "policy" is specious. Furthermore, the government *induced* the trial court into the procedure followed (submission of size, dimensions and adaptability of use to the jury), and because of induced error cannot complain. Thus the only question is whether there is substantial evidence to support the judgment.

STATEMENT OF CASE

This eminent domain action was commenced by the United States to condemn for park purposes approximately 200 acres of a 300 acre sandspit located in Marin County, California.

The sandspit taken was a portion of some 1900 acres of property owned by Drake's Beach Estates, Inc., a California corporation.

1. On the Issue of Title:

The Opinion of the Court of Appeals contains a succinct statement of the case on the issue of title and we will not burden the Court with a repetition of it here. (See pages 3a, 4a and 5a of Appendix "A" to the Petition.)

Initially, in the District Court, the United States took the position that the traverse lines of the survey as recited in the patent constituted the boundary of the lands granted and not the actual shoreline despite the fact that the patent itself recited that the land was bounded on one side by the Estero of Tomales and on two sides by the Pacific Ocean. This contention was abandoned on appeal and Petitioner conceded that the actual shoreline constituted the boundary and that if the land was part of the sandspit or peninsula and not an island at the time of the survey, it was included in the patent and is now owned by Respondent. (Opinion of the Court of Appeals, pages 3a and 4a of Appendix "A" of Petition; page 6 of Appellant-United States Brief in the Court of Appeals.) Under the facts and the law,

no other position was tenable. *Hardin v. Jordon,* 140 U.S. 371 (1891); *Thomas R. Bishop Co. v. Santa Barbara County,* 96 F.2d 198 (9th Cir. 1938), cert. den., 305 U.S. 623; *Anderson v. Trotter,* 213 C. 414 (1931), cert. den., 284 U.S. 686.

The District Court found that the land at the time of the survey and patent was part of the mainland lying above ordinary high tide for its entire length. (See Findings 10, 11, 12 and 13, pages 4a and 5a of Appendix "A" to the Petition.) No question was presented to the Court of Appeals on the issue of title other than the question of whether these findings were supported by substantial evidence.

Petitioner in the phrasing of the "Questions Presented" and elsewhere suggests that the only evidence presented was an 1859-1860 United States Coast Survey Map. Obviously, the writer of the petition neither attended the trial nor examined the record. Over 100 exhibits were introduced on the title issue consisting chiefly of maps, plats and surveys dating from 1854 to 1967, and four experts testified on this issue. Petitioner states that this issue rests on "documentary evidence and the Court of Appeals undertook no independent analysis of the facts on this issue". (Petition Page 10) The Opinion of the Court of Appeals is to the contrary: "We have carefully considered the evidence in the record on which the respective parties rely, both documentary and otherwise, in regard to the title issue and believe there is ample evidence to support the findings and conclusions of

the trial court on this issue". (Page 6a of Appendix "A" to the Petition).

Inasmuch as the only question presented to and determined by the Court of Appeals on the issue of title was whether the findings of the District Court were supported by substantial evidence, it is respectfully submitted that this is not an issue upon which this Court should grant a writ of certiorari.

2 and 3. On the Issues of Admissibility of Subdivision and Probabilities Evidence:

The condemned property was part of a recreational and residential development in progress on the entire acreage. As of the date of taking, Drake's Beach had commenced development of the entire spit. Five units of this subdivision had already been recorded (RT 198). Portions of the 300 acre sandspit had been filled and graded (in part) (RT 229-236), properly zoned (RT 193-197, 257), four miles of access roads were developed (RT 201, 547, 551-53, 551: 17-20, 562, 566), water developed (RT 211-214, 217-221, 235, 258, Exhibit 14, 291-296), planning and mapping approved (RT 196, 204-210), financing was arranged (RT 216), and California Division of Real Estate Reports were issued (RT 223).

In the Spring of 1962 development of the condemned property was imminent. It had been zoned and mapped as part of the overall subdivision general plan, and utilities, grading (RT 2194) water (RT 291-296) roads and financing were immediately available and ready to complete. Physical work had commenced, in-

cluding surveys (RT 2205, 2228, 4125, 4140), grading and fill (RT 230, 231), and soil tests (RT 222, 312, 4257, Exhibits 91, 102).

Demand for these subdivision lots was clearly strong (RT 245, 242, 246, 258, 262-263).

The government's project activities, including deliberate interference with this subdivision, culminated in the Spring of 1962 to prevent further subdivision and sales (RT 264, 2152-2155, 2165). Otherwise portions of this condemned property would have been developed and sold (RT 265, 266, 2151) *before October 23, 1963,* the date of taking.

For approximately one and one-half years this condemned parcel, while unable to proceed to completed subdivision, was not "taken." On October 23, 1963, a Declaration of Taking and Complaint were filed taking this property.

The case was bifurcated into two trials. The first phase of trial was on the issue of title. Judgment awarded title to defendant Drake's Beach (C.T. 196-203).

Drake's Beach then moved for a preliminary determination as to the size and dimensions of the condemned parcel by the Court, sitting without a jury. This motion was denied at hearing on April 29, 1969 (RT 5, 33, 34). At the government's urging, the District Court decided these should be submitted to the jury.

The second phase of trial, to determine market value, commenced on September 8, 1969 before a jury.

Evidence as to the size, dimensions, adaptability, use, as well as evidence of value, was presented to the jury.

The government's witnesses valued the land at $185,000.00 (based on 146 acres, RT 3971), $265,000.00 based on 212 acres (RT 3995) and $171,000.00 based on 146 acres (RT 3556).

The owner's three witnesses testified to the fair market value of the condemned property as $1,995,000.00, $1,600,000.00 and $1,600,000.00, respectively, in the condition it was in in 1963 (RT 370, 2243, 2302-03, 2496), taking into consideration those things which a buyer and seller would consider (RT 370, 2242, 2302-2303, 2496-2510).

On November 28, 1969, the jury rendered a verdict finding that just compensation for the land condemned as of October 23, 1963 was $700,000.00 (CT 472).

The owner's witnesses testified that a buyer and seller would consider the lot prices less the cost of completing the improvements among those matters bearing upon the value of the condemned property in the market.

Two of the owner's witnesses also testified to a comparable lot sales adjustment process and to the "developer's subdivision residual appraisal" approach (a market analysis of subdivision data) frequently used in the market which analyzed the adjacent market data of this subdivision and making appropriate deductions (development costs, selling and advertising

expenses, direct engineering and indirect costs (such as overhead, taxes), buyers anticipated profit, and gross acreage loss (to streets, etc.)) as factors which would affect the value of the condemned property at the time of taking. (RT 366-372, Exhibit 17, 2609, Exhibit 86B). The government objected to the Court's exercise of its discretion in admitting evidence of the lot prices and subdivision expenses it was established that the data itself and the developer's approach appraisal method are utilized in the market. This was conceded by the government's own appraiser.

The owner also presented testimony as to the reasonable probability of an agreement with the State that adjacent tidelands would have been available for temporary uses (dredging of small boat navigation channels, crossings, etc.) and to permanently fix the common boundary (by land exchange or boundary line agreement) (RT 2033, 2037). There was evidence that such use was beneficial and logical for both parties. One advantage was to permanently fix the common boundary line between the State and owner. It was proposed that portions of the subject property be donated to the public for beaches in the exchange. It was proposed by the State that dredging of the state's tidelands be done on a royalty basis (RT 2038, 2039), which dredging would provide boat channels for recreation.

The Court considered and then permitted the jury to consider and weigh: (1) Evidence that negotiations had taken place between the state and this owner, in the year or two preceding the filing of a Declaration

of Taking, toward a dredging and fill agreement; there was conflicting evidence as to why those negotiations were terminated, i.e., that they were withdrawn by the owner because the subdivision had been blocked by the government; (2) That some seventy (70) land exchange and boundary line agreements had been made by the state in the years preceding this taking, with several occurring in the same county, one of which was at Stinson Beach, a sandspit which had been subdivided and which was very comparable to the subject property; (3) the opinion testimony of a state agent and others that there were reasonable probabilities of such an agreement being achieved between this property owner and the state within a reasonable time from the date of taking; and (4) various reasons supporting and contrary to these opinions, including motivations of the parties.

As foundation for these opinions it was established that only two tracts were involved; the State had motives favorable to such agreements, including development of recreation and improvement of navigation, (RT 1982, 1993, 1994, 2042, 2043); the manner in which the agreements and permits were to be secured (RT dredging, 1976 et seq.); exchanges, etc., (RT 1980 et seq., 2116, 1984-87, 2025); the nature of the work (RT 1621); the legal availability of agreement (RT 1973, 1974, 2025); that many comparable transactions had been approved, several in the same area on virtually identical tidelands (RT 1988-1993, 1635); the costs and feasibility relating thereto (RT 1431, 1542, 1553, 1560); the cost of other alternatives

(RT 1430-1432, 1637-1642, 1726-1731, 1739); as well as the reasonable probability of such consents being obtained (RT 1356, 1621, 2027, 2033, 2036-2038, 2094). In fact the witness (state agent, Mr. Nadey) was the working officer for the State on these matters and his recommendations had almost been approved.

Throughout the trial the Court instructed the jury that the amount to be awarded was the fair market value of the property taken as it stood on October 23, 1963 (RT 2342-2347, 2318).

The verdict of the jury ($700,000.00) was more than the government's testimony, and less than the owner's testimony, and represents $3,300 per acre for 212 acres.

ARGUMENT

I

QUESTIONS ON THE TITLE ISSUE AS PRESENTED IN THE PETITION

Question No. 1 on page 2 of the Petition:

In the first part of this question, Petitioner is apparently reverting to the position taken in the trial court, namely that the traverse lines of the survey and not the actual shoreline constituted the boundary of the lands title to which was confirmed by the patent. In *Niles v. Cedar Point Club*, 175 U.S. 300 (1899) the surveyor drew a meander line along the inner edge of an extensive marsh bordering on Lake Erie. The Court held under the special facts of that case that the land patented extended only to the meander

line and that the meander line was intended to meander the edge of the marsh and not the shores of Lake Erie. (In this case no such question is presented because the meander line was admittedly a meander of the shores of Limantour Bay and of the Pacific Ocean. The patent said so.) However, in the latter part of the question Petitioner assumes that the surveyor found a channel at ordinary high tide where he drew the traverse "S.17½° W. 4.50" line, an assumption directly contrary to the facts and to the express findings of the trial court. Of course, if a channel actually existed there that would have been the boundary and no problem as to whether the traverse line or the actual shoreline was a boundary would arise. The first part of the question implies that the traverse line in the survey and not the shoreline was the boundary, and the second part assumes that the shoreline and the traverse line were at the same place, contrary to the facts as found. With all due respect to the Solicitor General this question as phrased is unintelligible.

Question No. 2 on page 2 of the Petition:

In the phrasing of this question Petitioner makes three assumptions, none of which are true. The first is that the District Court's findings were "based only on a Coast Survey map". The falsity of this assumption would be made evident by the most cursory examination of the record. Numerous maps and charts both antidating and postdating the U.S. Coast Survey Map of 1859-60 were introduced into evidence and considered by the trial court. The second false as-

sumption is that this map was "designed solely for navigational purposes". This is a map of the land showing contour elevations as well as the ordinary high tide line and the ordinary low tide line. (Plaintiff's Exhibit 28). The writer has apparently confused this map with another U.S. Coast Survey Map entitled "Preliminary Chart of Drake's Bay" also dated 1860, showing marine soundings. (Plaintiff's Exhibit 29) The third false assumption is that the surveyor's notes refer to "a channel of water" separating the spit from the mainland. Nothing of a sort appears in the surveyor's notes. (Plaintiff's Exhibit 3) He simply drew a traverse line.

Neither the record in this case nor the decision of the Court of Appeals presents for determination either of the questions on the issue of title as posed in the petition.

II

ON THE EVIDENTIARY ISSUES

The evidentiary questions urged upon this Court by Petitioner relate solely to whether the District Court *abused its discretion* in admitting certain evidence as relevant to market value, that is in allowing the jury to consider evidence consisting of (1) lot sales, development costs and the developer's subdivision residual appraisal method and (2) opinion evidence (and the reasons and facts relating thereto) of reasonable probabilities (i.e., an agreement with the State on adjacent tidelands boundaries and dredging which agreement was an alternative manner of utiliz-

ing the property which a buyer and seller would consider in the market.

The rule in regard to the admissibility of market value evidence in an eminent domain case is well stated in *United States v. 55.22 Acres of Land, etc., Yakima Co., Wash.*, 411 F.2d 432, 434 (9th Cir. 1969).

> "The determination of that question calls for an exercise of a *sound discretion* by the trial court, and the ruling thereon is reviewable only for abuse of discretion." (emphasis added)

The Court of Appeals has already reviewed the facts and record in this case. It concluded "that the trial court did not abuse its discretion in admitting the evidence of appellee, Drake's Beach, on the question of fair market value."[1]

A.

Subdivision facts and appraisal method evidence are admissible (On Question No. 3 on page 2 of the Petition)

The government's third question as framed states in part that the developer's residual method is ". . . unrelated to elements of actual fair market value." This implies that the evidence at trial of lot prices, development costs and the developer's subdivision residual appraisal method was not actually based upon factual market data which would be considered in the market by a buyer and seller.

In the record, there is substantial evidence that the evidence offered was from the immediate market, was accurate, comparable, and the best evidence and

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[1]Opinion of Court of Appeals, page 10a of App. A to Petition.

manner of appraisal to use in appraising this unique property. Thus the question, as framed, is disproven by the record at trial.

As the Court of Appeals notes, "the property in question was part of a recreational and residential development in progress. . . . Indeed, some preparatory physical work had already been completed."[2] Thus in the instant case the Drake's Beach Estate's property was in fact a property being subdivided and a substantial portion of the evidence used at trial were facts, generated in the development of this very subdivision.

1. Lot sales separately admissible

It is well established that the comparability of market data and sales is within the discretion of the trial judge. Lot sales are independently admissible as relevant to market value.[3]

2. Development costs separately admissible

It is also well established that evidence of development costs is independently admissible evidence, relevant to market value.[4]

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[2]Opinion of Court of Appeals, page 8a of App. A to Petition.

[3]*United States v. Lowrie*, 246 F.2d 472 (4th Cir. 1957); *United States v. 12 Tracts*, 268 F.Supp. 125 (1967); *United States v. 55.22 Acres*, 411 F.2d 432 (9th Cir. 1969); *United States v. An Easement and Right of Way*, 248 F.Supp. 702, 703 (1965); *People v. Auburn Ski Club*, 241 Cal.App.2d 781 (1966).

[4]*McCandless v. United States*, 298 U.S. 342 (1936) (costs of developing sufficient water supply to condemned property from offsite source); *United States v. Certain Land in Brooklyn*, 346 F.2d 690 (2d Cir. 1965) (demolition costs on comparable sales); *United States v. 84.1 Acres*, 348 F.2d 117 (3rd Cir. 1965) (reverses exclusion of costs for clearing timber on comporable land to adjust subject to comparable data).

3. Testimony as to the "developer's" or "subdivision appraisal method" is admissible

In condemnation actions, where subdivision of a condemned property is imminent or reasonably probable in the near future, it is well established that testimony as to the "developer's" or "subdivision appraisal approach" is admissible as relevant to market value and as to use.[5]

4. Rules favor admissibility

The admissibility of such evidence is well supported by sound policy. The Federal courts properly

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[5]*United States v. Iriarte*, 166 F.2d 800, 804 (1st Cir. 1948) (cert. den. 335 U.S. 816 [1948]); *Highland Park v. United States*, 142 Ct.Cl. 269 (1958); *Hazard Lewis Farms v. State of New York*, 1 A.D.2d 923 (1956), 149 N.Y.S.2d 658; *State Highway Dept. v. Thomas*, 128 S.E.2d 520; *State v. Cobb*, 169 So.2d 419; *United States v. Easement and Right of Way Over Two Strips*, 284 F. Supp. 71 (1968); *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943) aff'd 321 U.S. 743 (1944) (wherein a non-existent subdivision—contrasted with the instant property which was a subdivision with some completed work—was projected, and comparable rentals—contrasted to actual lot prices on the condemned subdivision—were utilized to estimate rentals (lot prices) on the condemned property, and then appropriate estimated costs were deducted to aid in determining fair market value); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal.App.2d 255 (1959); *Santa Clara County Flood Control & Water Conservation Dist. v. Fratis*, 177 Cal.App.2d 264 (1960); *Dash v. State*, 491 P.2d 1069 (1971); *Drake's Bay Land v. United States*, 424 F.2d 574 (Ct.Cl. 1970) and 459 F.2d 504 (Ct.Cl. 1972); *Hopkins v. Blank*, 506 P.2d 57. In those cases which have excluded evidence of lot sales, there was a lack of foundation evidence or no subdivision activity was imminent. The opinion of the Court of Appeals more completely states the prevailing rules and rationale. (App. A to Petition, pages 6a through 11a).

The only case cited by the government to the contrary is completely distinguishable on its facts; *United States v. Hickey*, 360 F.2d 127, 137 (7th Cir. 1966) was a criminal case in which just compensation was not the issue, not a condemnation case. The instant case is unique and therefore it distinguishable on its facts in two respects: the instant property was under subdivision, and there were no comparable sales.

follow a rule of admissibility of evidence which permits the District Court to exercise its sound discretion. This discretion is reversible only for its abuse.[6]

5. Subject property presented a rare condemnation appraisal problem

The condemned property was available for immediate subdivision development. Sales of lots identical to the ones commenced on the subject property had taken place immediately next door on property of which the subject property was, prior to this taking, a part. The development costs used to adjust the lot sales were factually related to costs recently incurred in the same project. There was an absence of sales of comparable property. Consequently, the "developer's appraisal approach" was deemed the most reliable appraisal method. (RT 2244, 2510).

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[6]Federal Rules of Civil Procedure, Rule 43(a), provides in part: "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which *favors the reception* of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." *Wibye v. United States.*, 87 F.Supp. 830 (1949), aff'd 191 F.2d 181 (9th Cir. 1951); See also *Napa Union High School Dist. v. Lewis*, 158 Cal.App.2d 69 (1958) which holds: "The rules for determining value of land taken by condemnation cannot, from the nature of the case, be inflexible. In each case, just compensation is the goal; and where a rigid application of even a settled rule will produce injustice it must be departed from so far as made necessary by the circumstances of the case." This concept of flexibility is endorsed in *United States v. Miller*, 317 U.S. 369, 373 (1943).

6. In absence of comparable sales, other methods and data are admissible

Where for any reason there is an absence of truly comparable sales and the property being appraised is readily marketable as a subdividable property, recourse must be had to an appropriate means of ascertaining value.[7]

7. Evidence admissible which would influence an informed buyer and seller of a developing subdivision

All facts which an owner would properly and naturally impress upon the intention of a buyer, and all facts which would influence a person of ordinary prudence desiring to purchase the property are admissible. *Kimball Laundry v. United States,* 338 U.S. 1 (1949).

Drake's Beach Estates' appraisers maintained that a buyer and seller would surely consider the existing

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[7]See *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949). The government's appraisal witnesses admitted there were no sales of "truly comparable" property (RT 339, 224, 2509-2511, 4031). In the absence of comparable sales, other methods must be resorted to in order to ascertain market value. In order for sales of other property to be admissible and relevant, that property must in fact be comparable. *Fairfield Gardens, Inc. v. United States,* 306 F.2d 167, 172 (9th Cir. 1962). *United States v. Miller,* 317 U.S. 369 (1943) ("Where for any reason property has no market, resort must be had to other data to ascertain its value; and even in the ordinary case, assessment of market value involves the use of assumptions which make it unlikely that the appraisal will reflect true value with nicety."); *St. Joe Paper Co. v. United States,* 155 F.2d 93, 97 (5th Cir. 1946); *Hanson Lumber Co. v. United States,* 261 U.S. 581, 589 (1923) (original costs, replacement costs); *United States v. Sowards,* 339 F.2d 401 (10th Cir. 1964) ("In condemnation cases market value is usually established by sales of like property. It does not follow, however, that the owner is precluded from proving value when there have been no comparable sales. In such cases, resort may be had to the best available data which, even though speculative, under some circumstances, may be sufficient to allow a jury to make an informed estimate of value."); *United*

successful subdivision activity, including proven demand, lot sales, development costs, etc., which had been generated in this very development, especially since sales of lots from the condemned property were imminent (and, in fact, stopped by the government in 1962, one and one-half years before the Declaration of Taking filed in October, 1963 (RT 1558)).

These judicially accepted rules supporting admissibility, considering the ultimate goal of "just compensation" in a condemnation case, well support the admissibility of lot sales, development costs and the "developer's subdivision residual appraisal method" as evidence of market value an informed buyer and seller would consider. This is particularly so where the subject property is a part of a developing subdivision, and portions of it would have been developed but for the interference by the government for two years preceding the taking.[8]

States v. 2.1 Acres, 138 F.2d 295 (7th Cir. 1943) (No true comparable sales—all relevant facts); *Todd v. United States*, 155 Ct.Cl. 111 (1961); *United States v. Benning*, 276 F.2d 248, 251 (5th Cir. 1960) ("Where few sales, other evidence is properly admitted in the discretion of the court.")

[8]Having successfully thwarted (and illegally interfered with) the owner's property rights for approximately two years before the taking, the government would have the courts block evidence of the reasonable probability of development and the lot prices which would have been realized absent the government's interference. These steps in thwarting development advanced the government towards its own project; therefore, those prohibitions placed on development by the government must be ignored and the property considered in its hypothetical condition in the absence of the adverse effect and interference resulting from the condemnor's project. *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Meadowbrook Club*, 259 F.2d 41, 45 (2nd Cir. 1958); *Drake's Bay Land v. United States*, 459 F.2d 504 (1972); *In re Elmwood Project (City of Detroit v. Cassese)*, 376 Mich. 311; *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964); and *Sayre v. United States*, 282 F.Supp. 175 (1967).

8. Government contentions disproven by the record

The arguments the government now advances completely ignore the record and lack pertinent authority. Among them are the following:

(a) *Appraisal Method:* The government inaccurately states that there is no proof that this appraisal technique is used in the area. The record shows to the contrary.[9]

(b) *Not Speculative:* The government has characterized the developer's subdivision residual approach as "speculative." The District Court and the Court of Appeals did not agree,[10] and for good reason. It was testified that this subdivision method (as well as the data upon which it was based) was the most reliable appraisal method for this particular property which was under subdivision development.[11]

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[9]The "developer's" (or "economic") approach is well recognized and accepted as an appropriate appraisal method for value determination. For example, see Paul Fullerton, "Development Analysis for the Valuation of Vacant Land," in *Journal of the American Institute of Real Estate Appraisers*, Vol. XXXIII (April, 1965), pp. 211-225. Even the government's appraisal witness frankly conceded that this was a proper approach, as fair as any (RT 4128), and that had he more time he would have used this approach in this case, and that it could have been his primary approach (RT 4007, 4130, 4043, 4010 and 4028).

[10]Opinion of the Court of Appeals, page 9a of App. A to Petition:

> "It is claimed the method is speculative in the extreme. . . . We do not agree."

[11]The owner's appraisal witnesses steadfastly maintained that in the absence of any comparable sales, this appraisal approach was the *only* reliable appraisal method (RT 2244, 2510).

(c) *Related to Market:* Next, the government states that this evidence is "not related to the market." The lot sales, development costs, and the particular data that went into the developer's subdivision residual appraisal method had been generated from the very development of which the subject parcel was a portion, and the facts were demonstated as relating to the subdivision immediately adjacent to the condemned property. It was testified that this appraisal approach is the typical one a prospective buyer employs in making an appraisal of land under development or potential development for subdivision. In condemnation, it is the market we are attempting to emulate. *Almota Farmers Elevator and Warehouse Co. v. United States*, ... U.S. ..... (No. 71-951).

(d) *Market Value—Not Highest Price:* It is unfairly inferred by the government that the owner equated the developer's residual appraisal method with market value, and that said appraisal process indicates the "highest prices," not the "actual price" (whatever that is). As the Court of Appeals notes, the "trial court correctly instructed the jury during the trial that the amount to be awarded was the fair market value of the property as it was on October 23, 1963 . . .". (Opinion of Court of Appeals, pages 10a and 11a, of App. A to Petition.)

The owner's witnesses did not urge that a buyer and seller who sought to negotiate an open market sales would have paid the "ultimate sale price" of the completed lot prices and ignore appropiate adjustments. Nor did the owner's appraisers equate fair

market value to the values indicated by the "developer's residual appraisal process."[12] This appraisal process was merely considered among all the factors a buyer and seller would consider in the open market.

(e) *Increased Litigation:* Lastly, the government threatens a spector of increased litigation, if liberalized rules of evidence are permitted. First, the test of admissibility of evidence is and should remain relevancy. The object of a condemnation trial is just compensation. There should be an attempt, in condemnation proceedings, to simulate as closely as possible the factors which actually influence the market. The developer's residual appraisal method is used in the market and it considers facts deemed relevant by buyers and sellers in the market. It is particularly pertinent in a case such as this where a unique property (no comparable sales) is under development at the time of condemnation. Second, if litigation were to increase, it should have already happened, since established judicial precedent has already held this appraisal method, and the data upon which it is based, admissible.

9. This case turns on its own facts

The evidence (and as to reasonable probabilities) was clearly relevant to use and to value. Its admission is supported by sound precedent and good sense, essentially because the land condemned is unique, a developing subdivision on a large sandspit, and truly

[12]The owner's appraisal opinions were less than the value of the land as indicated by lot prices less costs of completing the subdivision (RT 2252, 2284, 2315, 2534 and 2606).

comparable data was non-existent. Despite its need for adjustment or interpretation (all evidence, even "comparable sales" need adjustment), this was the *best* evidence available.[13]

Considering that the government suppressed the completion of the subdivision and thus rendered "hypothtical" what would have been in large part fact on the condemned property, what *was* fact (dredging activities contracted for, lot sales, developments costs actually incurred, etc.) within this very subdivision should certainly be admissible to show the market value of what truly *was* taken from this owner.

10. Desired result: indemnity for what was taken

In a condemnation proceeding, the desired result is to see that the landowner is put in as good a position pecuniarily as he would have occupied if his property had not been taken. *Seaboard Airlines R. Co. v. United States,* 261 U.S. 299 (1923). The measure of indemnity must remain flexible to fit the case. *United States v. Miller,* 317 U.S. 369 (1943).[14] The very essence of condemnation law is to assure that no individual owner should bear a disproportionate

[13]As the District Court said, "[This was] '. . . probably the best one could do under the circumstances . . . .'" (RT 5163).

[14]In *United States v. Miller*, supra, this Court stated:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value. The owner has been said to be entitled to the . . . fair market value of what is taken."

share of the costs and losses imposed by public works. Since the public benefits it should pay for losses imposed. This Court has laid down broad guidelines (as set forth above) for the purpose of achieving this desired result, i.e., "just" compensation. The measure and method of ascertaining just compensation should remain flexible to fit each case. When a developing subdivision is taken, those things which would influence the market should be considered.

11. Summary

Inasmuch as the only question presented to and determined by the Court of Appeals on this evidentiary issue was whether the District Court abused its discretion in admitting evidence (as to lot sales, development costs and the developer's subdivision residual appraisal method), it is respectfully submitted that this is not a matter on which this Court should grant a writ of certiorari.

B.

Opinion evidence as to reasonable probabilities (of availability of an agreement with the state adjoining tidelands) is admissible
(On Question No. 4 page 3 of the Petition)

1. No procedural question was presented to the Court of Appeals

The Government's fourth question raises a procedural question only ,i.e., is the consideration of this evidence for the jury?[15] Thus, the Government has

[15]The Government's fourth question is new. It is phrased: "Whether the rulings below permitting the jury to determine what State tideland policy had been at the time of taking conflict with this Court's decision in *United States v. Reynolds*, 397 U.S. 14 (1970)."

abandoned its attack in the Court of Appeals on the admissibility of reasonable probabilities evidence and competency of an expert witness.

The opinion of the Court of Appeals does not present for determination the fourth question in the Government's petition. Thus the Government now represents a procedural question, different from that question which was presented to or determined by the Court of Appeals.

Since this procedural issue was not raised below, we urge it is improper to raise it before this Court. In addition it lacks merit on the record. The judge preliminarily considered this evidence (in ruling on its legal and factual availability), and then the jury considered it in relation to market value (as a factor —an alternative way to utilize the property) and in its bearing on size and uses of the condemned property.

2. For the jury to consider (admissible)

Opinion evidence as to reasonable probabilities of agreements with the State is relevant and admissible as to its market value and use. *McCandless v. United States,* 298 U.S. 342 (1936); *United States v. Waterhouse,* 132 F.2d 699 (9th Cir. 1943), aff'd 321 U.S. 743 (1944); *Olson v. United States,* 292 U.S. 246, 255 (1934); *United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 275 (1943).

Where evidence shows reasonable probability of agreements affecting adaptability of lands for specific uses, the evidence regarding prospective uses is ad-

missible, and whether adaptability and probability affect market value is for the jury. *United States v. Waterhouse, supra.* The weight of reasonable probability opinion evidence is a question properly left to the trier of fact. *United States v. 3276.21 Acres,* 194 F.Supp. 297, 302. See also, *Olson v. United States, supra; McCandless v. United States, supra.* All facts which would naturally and properly impress a buyer or seller should be proper. *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).[16]

Also under Rule 43[17] the rules of evidence of the State of California also apply to admit this evidence.[18]

The Federal practice follows this rule favorable to admissibility. See *Wibye v. United States,* 87 F.Supp. 830, aff'd 191 F.2d 181 (9th Cir. 1951).

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[16]The test is what uses and what factors would be considered in the market place. *United States v. Land in Drybed of Rosamond Lake,* 143 F.Supp. 314, 318 (1956). There should be consideration of all facts which can be expected to reasonably affect price. *United States v. 4.105 Acres,* 68 F.Supp. 279, 299 (1946). Any evidence of what might reasonably influence a willing seller and a willing buyer should be considered in determining market value. *Wolff v. Commissioner of Puerto Rico,* 341 F.2d 945, 947, 948 (1st Cir. 1965). No evidence should be excluded which an ordinary prudent man would take into account. *United States v. Ham,* 187 F.2d 265, 267 (8th Cir. 1965). The purpose is to emulate the market. *Almota Farmers v. United States,* ..... U.S. ..... (No. 71-951), 93 S.Ct. 791 (1973).

[17]Federal Rules of Civil Procedure, Rule 43(a) says in pertinent part: "All evidence shall be admitted which is admissible under the *rules of evidence* applied in the Courts of general jurisdiction of the STATE in which the United States Court is held . . . In any case, the . . . rule which favor." (Emphasis added).

[18]In California, it is well settled that reasonable probabilities evidence is admissible, e.g., see *People v. Ogata,* 240 C.A.2d 262, 269, 49 Cal.Rptr. 397 (1966).

3. Preliminary matters were decided by the judge

This opinion evidence was relevant, and therefore the trial judge admitted it for jury consideration. The trial judge also performed his function.[19] The record will reveal that the trial judge preliminarily decided the matters of "legal availability" and "fact-

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[19]The Government now argues: "The question of what state policy was prior to the federal project on the use of state wetlands was a collateral matter to be determined by the trial judge." The question implies the trial judge did not decide whether there were any State objectives (not "policies" by correct definition) which affected the legal availability of the agreements. The Government's use of the word "policy" is incorrect on the record, and loose semantics.

One basic fallacy of the Government's fourth question is that it assumes, contrary to the record below, that any "policy" exists at all. As the word "policy" is defined, there was no single or dominant "policy" in this case.

The word "policy" is defined (by Webster's New World Dictionary, College Edition) as: "wise management; any governing principle plan or course of action; and (by Black's Law Dictionary, Fourth Edition) as: "The general principle by which a government is guided in its management of public affairs, or the legislature in its measures . . ."

Public policy properly cognizable by courts is that clearly derived from the Constitution, statutes and judicial decisions of the entity. *Brown v. American Railway Express Corp.*, 128 S.C. 428, 123 S.E. 97, 98; *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120, 122; *Hogston v. Bell*, 185 Ind. 536, 112 N.E. 883, 886; *New York Life Insurance Company v. Hamburger*, 124 Mich. 254, 140 N.W. 510, 512.

From this pure meaning of the word, there was no "policy" as such from the transcript below for there was no clear or paramount objective or objectives unopposed by other State goals or motivations (or "policies") which guided State action as to its tidelands. What is more, there were several to an effect opposite of that urged by the Government, as were the statutes themselves.

If the word "policy" is used loosely as considerations or reasons, there were various "policies" or reasons which favored boundary or exchange agreements. These promoted development and man-made change of tidelands to accommodate the needs of man (recreational, land control, certainty of boundaries, etc.). They then promoted man-made recreational boatways (while yielding royalty as compensation for the sand removed) and supported the permanent fixing of tidelands boundaries of adjacent owners.

ual foundation" before admitting the opinion evidence. He made his own preliminary determination that the then applicable California law and the pertinent facts and reasons made the prospects of these agreements legally available and factually practicable to achieve.

In ruling the opinion evidence admissible, the trial judge in effect held that the California law made these procedures and transactions available,[20] ignoring the condemnation project, and that any state purpose to keep the tidelands in their natural state were then not sufficient to prohibit these limited and mutually beneficial agreements on the particular facts and circumstances of this case. The trial court obviously determined there was no single dominant State tidelands "policy", nor was there any other reason which would preclude as a matter of law the achievement of these types of agreement. In the context of weighing the expert opinion, factually many reasons existed and were considered as they would be in the market place. And the jury was permitted to hear the opinions and weigh these reasons and factors. There is substantial evidence to support their

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[20]The trial judge heard arguments in chambers on the applicable law. He considered the applicable statutes, policies and procedures (including a published opinion of the California Attorney General interpreting these laws).

There were (and are) State statutes which authorize land exchanges (California Public Resources Code, Section 6307) and boundary line agreements (California Public Resource Code, Section 6357). These statutes are supported by various benefits to the State. They help the State to identify and permanently fix boundaries of State lands, to promote recreational boating, to promote navigation and commerce, inter alia. The evidence was to the effect that the State favored these transactions.

verdict and the judgment. This procedure was in accord with standard trial procedure.[21]

The trial judge also determined that there was an ample foundation in fact for the prospect of an agreement. He heard the witnesses' qualifications.[22] He determined there were sufficient foundational facts for their opinions.[23]

We submit a substantial preponderance of the evidence reflected that a reasonable probability existed favoring an exchange of lands and the availability of dredging on the date of taking.

As the Court of Appeals correctly observed, "The trial court in its discretion, properly decided the witnesses were competent to testify and apparently found that a *sufficient foundation had been shown for such testimony.*" (emphasis ours)[24]

The government argues (Petition, page 12) that "the question of what State policy was prior to the Federal project on use of State wetlands was a collateral matter to be determined by the trial judge."

If one substitutes the words "preliminary" for "collateral" and "statutes and goals were" for "pol-

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[21]For example see *United States v. Meadowbrook*, 259 F.2d 41, 45 (C.A.2d, 1958), (Reasonable possibility of zoning change). See also, *United States v. Delano Park*, 146 F.2d 473, 474 (C.A.2d, 1944). (Trier of fact may consider policies during World War II tending to limit availability of building materials as affecting market value).

[22]See Statement of Case, *supra*.

[23]As to foundation facts, see Statement of Case, *supra*.

[24]Petition, Appendix "A", page 12a.

icy was" (as we show above), this is what the trial judge did do in the context of his ruling as to availability of state statutory procedures for an agreement, and in determining that factual foundation did exist for opinion evidence.

The procedure below (as to whether the judge or jury decided various matters) was consistent with *McCandless v. United States,* 298 U.S. 342 (1936) (reasonable probabilities evidence is admissible to the jury and is relevant to use and fair market value), and consistent with *Olson v. United States,* 292 U.S. 246, 255 (1934) (relevant to use, a foundation for such evidence opinion). Said rulings are not inconsistent with *United States v. Reynolds,* 397 U.S. 14 (1970) for the *trial court did determine the preliminary matters* (legal availability, factual foundation) required of it as a preliminary matter. This is analogous to the function of the trial judge prescribed in *Reynolds* (scope of project). Had he determined that there was no factual foundation or legally approved manner of accomplishing the agreements, the evidence would have been excluded, just as *Reynolds* holds that evidence as to use flowing from the project itself (when a property was within the scope of the project) should be excluded. Rather on the facts and laws applicable in this case he properly and preliminarily concluded there was a proper foundation, and he admitted the evidence. There were conflicting facts and reasons to be weighed. There is substantial evidence to support the jury's findings and the judgment.

4. Jury weighed opinions

Reynolds does not preclude *jury consideration* of evidence relating to market value. *Reynolds* is in harmony with *McCandless* and *Olson*. *Reynolds* holds the issue of market value is for the jury. *McCandless* and *Olson* hold evidence relevant to market value (combined use of lands) and relevant to use (adaptability) is admissible and for the trier of fact (jury) to weigh. If the jury must determine market value *(McCandless, supra)* and adaptability and use *(Olson, supra)*, then necessarily it must weigh evidence found relevant by the trial court.[25]

The record also shows the jury was not given the task of determining State tidelands policy, contrary to the Government's statement in its fourth question. The record refutes any inference to the contrary. After the court made its preliminary determination (competency, statutory availability, factual foundation, etc.), the witnesses testified as to their opinions, and evidence was considered concerning the facts and reasons tending to support or refute such opinions.[26] The jury then weighed the experts opinions as to reasonable probabilities in the light of reasons and facts given by the experts to support their opinions. The jury's function was quite normal.

The jury was given this evidence in the framework of what an informed buyer and seller would want

[25]See, e.g., *United States v. Waterhouse*, 132 F.2d 699 (C.A. 9, 1943) (evidence regarding uses is admissible and whether adaptability and probability affect market values is for the jury).

[26]An expert witness, when testifying in the form of an opinion, may also state the reasons for his opinion and the facts and matters upon which it is based.

to consider in the open market in determining fair market value. There is nothing in the record to indicate the jury did not carry out the trial judge's expressed instruction that these factors should be considered to the extent they would affect market value.

5. No procedural error; but if there was any the government invited it

This Court is likely not to consider this question because error, if any, was invited. It is the owner's position that this evidence was admissible as *relevant to market value*.

Assuming (purely arguendo) it is not admissible for either purpose, then any error (procedural or otherwise) was "invited error." The Government led the trial court to rule, over the objections of this owner[27] that the issues (size and dimensions) were for the jury. The opinion evidence of reasonable probabilities of an agreement and the factual founda-

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[27]The owner had moved for a court trial on all issues. Particularly the owner requested the trial *court* determine the size and dimensions of the condemned property (Hearing, April 29, 1969, RT 5, 33, 34). At the Government's urging, the District Court ruled those issues (size and dimensions) were for the *jury*. This naturally led the trial court to place the issues of use (adaptability and feasibility), which the issues of size and dimensions related to before the jury as well. Not that this is error, but if it is, the Government caused it. Thus the Government substantially contributed to this evidence being presented to the jury, by insisting the *issues* to which this evidence related (and which it was directed to rebut) be determined by the jury. Now for the first time in this case, the Government urges error in admitting for *jury* consideration probabilities evidence, and any evidence (such as State "policies") affecting such prospects in the market.

tion and reasons relating to it were evidence relevant to size tending to rebut or disprove the Government's contentions that size and dimensions militated against adaptability and use of the subject property for subdivision. Thus any error in admitting evidence (e.g. of State motivations, if any) which related to that issue was caused by the Government.

On this record, such would clearly be invited error, which will prevent this Court from reaching this question.

The Government cannot on the one hand insist that certain issues (size and dimensions relating to adaptability and use) go to the jury and then on the other argue that the jury must determine this issue in a partial vacuum, i.e., that the owner's evidence (which tends to rebut the Government's contentions to that issue) should not have been admissible or considered by the jury on those issues.

The Government has surely waived any objection to the procedure followed by the Court by inviting any error. A party may not complain of error of the trial court in submitting or not submitting a question to the jury when the party itself in the trial court *requested or suggested that* the question should be determined in another procedural manner. See: *Law v. United States*, 266 U.S. 494 (1925); *Pacific Indem. Co. v. McDonald*, 107 F.2d 446 (9th Cir. 1939); *Crockett v. United States*, 136 F.2d 11 (9th Cir. 1943); *Devine v. Zimmerman*, 133 F.2d 850, 852 (8th Cir. 1943); *Platt v. United States*, 163 F.2d 165, 168 (10th Cir. 1947).

When the parties rested, and before the verdict, this owner again moved that the court dismiss the jury and itself determine all issues including size, dimensions and probabilities evidence relating thereto. The government refused the court's suggestion to do so and again opposed the owner's motion to submit all matters to the trial judge for determination. The government insisted on the then pending jury verdict (RT 5161). Thus the government's present attack upon the judgment and jury's verdict is inconsistent with its position throughout the trial, which position invited any error complained of.

6. This evidence was insignificant and not necessary to support the judgment

The jury had independent evidence to support its verdict, i.e., the subject property could have been developed within itself, without reliance upon probabilities evidence.

Thus the jury obviously found in accordance with the owner's basic position that no exchange of lands or boundary line agreement was necessary. Compelling proof was that the adjacent portions of the sandspit had been developed without agreement, and the balance of the entire parcel, of which the subject taking was only a portion, contained ample fill to complete development. As to the issue of market value, this evidence was only one alternative manner by which to use the property which would be considered by a buyer and seller if size was substantially less than 200 acres, or if other sources of fill were not preferred.

7. **Summary**

The Government's Petition should be denied for several reasons, any one of which is compelling and standing alone will support denial.

First, the opinion of the Court of Appeals does not present this procedural question, i.e., the duty of the judge/jury, vis-a-vis evidence of "State policies" under *United States v. Reynolds,* 397 U.S. 14 (1970). The Government did not raise this point on appeal.

Second, if indeed any error occurred, it was clearly *invited error* induced and caused by the Government, over objections of this owner, when it led the trial court to submit issues to this jury to which this evidence was relevant.

Third, the judgment is *valid on the record* (the record does not present this question for decision). Applicable procedural and substantive precedent approve the procedure which was followed. The error the Government now describes is predicated on a fictitious record, not this trial record. This record will reveal that the jury did not *"determine State tidelands policy",* it decided market value; it merely considered *evidence* relevant to market value (including the prospects of "State *policies")* in weighing opinion evidence of reasonable probabilities of an agreement, which opinion and agreement were relevant to market value; nor did the trial judge fail to consider and decide relevant matters of State law (or "policies"). By ruling this evidence admissible after hearing these same objections the trial judge decided (a) that State law did make available and (b) a

factual foundation did exist for the reasonable likelihood of said agreements being achieved in the near future.

Last, the jury had evidence of alternatives which would not (and did not) at all require any reliance upon this evidence, which was relatively insignificant evidence in a three-month trial. This alternative evidence *independently supports* the judgment.

The only questions presented as to these evidentiary issues are whether (1) the District Court *abused its discretion* in (a) admitting subdivision data, factual evidence of what was in fact happening, as relevant to "market value" of this subdivision in the market, and (b) in admitting opinion evidence of probabilities of an agreement with the State and the facts and reasons supporting the opinions; and (2) whether there was substantial evidence to support the judgment.

It is respectfully submitted that these evidentiary points are not matters upon which this Court should grant a writ of certiorari.

We also respectfully suggest that this Court need not review findings concurred in by two courts below and supported by substantial evidence, the admissibility of which was in the sound discretion of the District Court.

CONCLUSION

For the reasons stated, we respectfully suggest the government's Petition for Certiorari be denied.

Dated, Burlingame, California,
June 11, 1973.

Respectfully submitted,
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